80-1317

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SUPREME COURT, U.S.

IN THE SUPREME COURT
OF THE UNITED STATES

UNITED STATES OF AMERICA — PETITIONER

VS.

JEFFREY JOSEPH BENSON — RESPONDENT

RESPONSE TO PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The questions presented whether a warrantless search of an unlocked container within reach of an arrestee conducted contemporaneously with a lawful arrest, may be upheld as a search incident to that arrest.

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STATEMENT

In Response to the Government's Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, the Respondent initially suggests that the question presented on Page I of Petitioner's Brief is erroneous and misleading as to the facts in the case at bar. The Petitioner has suggested that the question presented is as follows:

> Whether a warrantless search of an unlocked container, within reach of an arrestee, conducted contemporaneously with a lawful arrest, may be upheld as a search incident to that arrest.

In the case at bar, the unlocked container was the Respondent's luggage. Furthermore, this unlocked container was not within the reach of the arrestee, as it was in fact, in the exclusive control and possession of Detective Hutchinson of the Little Rock, Arkansas Police Department.

The facts are that members of the Little Rock, Arkansas Police Department and members of the Drug Enforcement Agency of the Federal Government, on the advice of an informant, who had never been used before, had gone to the Little Rock, Arkansas airport on the morning of August 27, 1979, allegedly to await for a Bruce Bell and an individual named "Jeff" to arrive in the early morning hours. There was no arrival of either of the individuals, and the members of the Little Rock Police Department and the Drug Enforcement Agency, who had surrounded the airport, took the informant and went back to their previous locations.

Again, on that same afternoon, at about 6:00 P.M., the members of the Drug Enforcement Agency and the Little Rock Police Department once again went to the Little Rock, Arkansas Airport to await the arrival of Bruce Bell and an individual named "Jeff." When the individual named "Jeff" arrived, the informant did not await the arrival of Bruce Bell, but took the individual named "Jeff" to his vehicle, at which time approximately four officers "rushed" the vehicle, when a signal was given by the informant, and arrested the Respondent while another officer removed his luggage from the backseat, and eventually searched the Respondent's luggage for contraband.

The Eighth Circuit Court of Appeals reversed the conviction of this Respondent, relying on the decisions of United States v. Chadwick, 433 U. S. 1 (1977) and particularly Arkansas v. Sanders, 442 U. S. 753 (1979), and also United States v. Schleis, 582 F. 2d 1166 (1978) and United States v. Stevie, 582 F. 2d 1175 (1978), cert. denied, 443 U. S. 911 (1979). It was clear to the majority of the Justices on the Eighth Circuit Court of Appeals, that the Respondent was in the front seat of the car and the bag was in the rear seat of the car at the time of its seizure. More importantly, the bag had been removed by an officer while the Defendant was being held by two other officers and the luggage was in the exclusive control, at the time of the search, of the officer who removed him, and "there was no longer any danger that Benson might gain access to the bag to destroy evidence or grab a weapon."

Clearly, the facts in the case at bar are very similar to the facts in the Arkansas v. Sanders, 442 U. S. 753 (1979).

REASONS FOR NOT GRANTING THE PETITION FOR CERTIORARI

The Respondent submits to this Honorable Court that Rule 17 of the Rules of the Supreme Court of the United States specifies certain considerations governing review on certiorari. Furthermore, the Respondent submits that under the guidelines of Rule 17, there is no reason why a Writ of Certiorari should be granted in this particular case.

In particular, the Respondent states for its reasons for not granitng certiorari as follows:

A. The Eighth Circuit Court of Appeals has not rendered a decision in the case at bar, which conflicts with any other decision of another federal court of appeals on the same matter. Furthermore, the Eighth Circuit Court of Appeals has closely followed the decisions of this Honorable Court, and in particular, the decision in Arkansas v. Sanders, supra, and has certainly not departed from the accepted and usual force of judicial proceedings in this matter.

B. There is no decision of a state court of last resort which has decided a federal question in a way which conflicts with a decision in aother state court of last resort, or in a federal court of appeals.

C. The case at bar does not involve an important question of Federal law which has been decided by a state court

or a federal court of appeals which needs to be settled by the United States Supreme Court. On the contrary, the United States Supreme Court has settled the matters concerning the search of a person's personal luggage in deciding that when you are dealing with a piece of luggage, there is an expectation of privacy, and that such is governed by the Fourth Amendment to the United States Constitution, and that certainly, in the case at bar, when the true facts are analyzed, these officers have more than ample opportuity to obtain a valid search warrant, but merely declined to follow the processes of the law.

The petitioners would have this Court believe that the decision before the Court in New York v. Belton, cert. granted, 80-328 (Jan. 19, 1981) would have some bearing on the case at bar. The Respondent strongly objects to this contention, in that the Belton case does not deal with personal luggage, but with the search of clothing, which may or may not have been within the exclusive control of the police.

The case at bar is readily distinguished from Belton (supra), in that in this case, the Respondent was completely removed from his luggage, his clothing had been search, he had been searched, but his luggage was far removed from him in the exclusive control of a police officer. It would have been

rather a simple task to obtain a search warrant to search the luggage, and that certainly there is a closer factual similarity to the Sanders (supra) case than in the Belton (supra) case.

It has been argued by the Respondent that the conduct of the Little Rock Police Department and the Drug Enforcement Agency officers cannot be tolerated, in that the United States Supreme Court has long held that failure to obtain a search warrant when there was time and opportunity to do so, invalidated what would otherwise be a valid search. Trupiana v. United States, 334 U. S. 699 (1948) and McDonald v. United States, 335 U. S. 451. Despite the Petitioner's argument, it is clear from a reading of the transcript that the officers clearly separated the Respondent's luggage from the idea he may have had a weapon. Such can clearly be seen in the transcript of this case in several situations:

Q. O.K. So, after you saw the lights come on what did you do?

A. I went to the passenger's side of the vehicle, along with special agent, Morris, of the Drug Enforcement. Also present was Detective Hutchinson of the Little Rock P.D. Narcotics and Mike Lowery, also of the Little Rock P.D. Narcotics. Upon getting to the car, I opened the door. I told Jeff,"Police Officer. You are under arrest. Get out of the car." He sat there. I said it again. I said, "Police Officer, you're under arrest.

> Get out the car." Still, he had not made any movement. I started to lean into the car. He turned around sideways in the car. His arm came up the top of the seat. At that time, I thought that he was going to reach into the backseat for a weapon, or the bag. I physically took hold of Jeff and took him from the vehicle. At that time, I was removing him - or when he made his motion to turn around, Detective Hutchinson seized the bag from the backseat.

That even in the police officers' own testimony he was reaching ". . .for a weapon or the bag." Once the bag was removed from his possession and was in the exclusive possession of the police, they should have obtained a warrant, as provided in Arkansas v. Sanders, (supra). This language is found throughout the transcript in testimony by all officers. (tr. pg. 95).

CONCLUSION

In conclusion, the Respondent submits that there is no valid reason that this Honorable Court should be requested to grant a Petition for Writ of Certiorari to the United States Court of Appeals for the Eight Circuit. Furthermore, the Respondent suggests that this Honorable Court should not defer consideration of this Petition, pending its decision in New York v. Belton, in that the Belton case is factually dissimilar from this case, and in fact, this factual situation is precisely what this Court ruled on in the case of Arkansas v. Sanders. In order to protect persons Fourth Amendment rights and to prevent the search of their personal luggage, which could contain any personal item of an individual, without a valid search warrant.

Respectfully submitted,

Q. Byrum Hurst, Jr.
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MOTION TO PROCEED INFORMA PAUPERIS

Comes now the Respondent, JEFFREY JOSEPH BENSON, and for his Motion for Leave to Proceed Informa Pauperis in his response to Petition for Writ of Certiorari, states and alleges:

I.

That the Respondent, JEFFREY JOSEPH BENSON, had retained counsel at his trial in the United States District Court for the Eastern District of Arkansas in Little Rock, Arkansas, and same retained counsel prosecuted his appeal to the Court of Appeals for the Eighth Circuit of the United States.

II.

That the Respondent is without funds to continue to prosecute defense of the Petitioners request for Writ of Certiorari and asks leave to proceed under Rule 46 of the Rules of the Supreme Court of the United States.

III.

The Respondent has attached an Affidavit attesting to his indigent status as he can not pay either attorney fees or printing costs.

WHEREFORE, Respondent, JEFFREY JOSEPH BENSON, prays that he be given leave to proceed informa pauperis in his response to Petition for Writ of Certiorari and for all other relief to which he is entitled under the rules of the Supreme Court.

JEFFREY JOSEPH BENSON, Respondent

By: _____
O. BYRUM HURST, JR., Attorney for Respondent

STATE OF ARKANSAS)
)SS
COUNTY OF GARLAND)

VERIFICATION

I, Q. BYRUM HURST, JR., being duly sworn, hereby state on oath that the facts set forth in the foregoing are true and correct to the best of my knowledge, information and belief.

Q. BYRUM HURST, JR.

Subscribed and sworn to before me this 3rd day of April, 1981.

NOTARY PUBLIC

My Commission Expires:

10-2-84

CERTIFICATE OF SERVICE

I, Q. BYRUM HURST, JR., do hereby certify that I have this 3rd day of April, 1981, duly served a copy of the foregoing on the attorney for the Petitioner, by placing same in the U. S. Mail, postage prepaid, addressed to Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D. C. 20530.

Q. BYRUM HURST, JR.